United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Affidavit

76-6047

To be argued by
NATHANIEL L. GERBER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6047

HEMPSTEAD BANK,
Plaintiff-Appellant,

—v.—

JAMES E. SMITH, Comptroller of the Currency of the United States and THE CHASE MANHATTAN BANK, NATIONAL ASSOCIATION,
Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATEES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE, JAMES E. SMITH, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES

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Defendants-Appellees.

BRIEF FOR DEFENDANT-APPELLEE, JAMES E. SMITH, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES

Preliminary Statement

Plaintiff-appellant Hempstead Bank appeals from an opinion and order of the Honorable Lloyd F. MacMahon, United States District Judge for the Southern District of New York, entered February 5, 1976 denying appellant's motion for summary judgment and granting summary judgment in favor of defendants-appellees, James E. Smith, Comptroller of the Currency of the United States (the "Comptroller") and the Chase Manhattan Bank, National Association ("Chase"). Judge MacMahon's opinion is reproduced in the Joint Appendix at pp. 125-134.*

* References to the Joint Appendix filed by appellant are hereafter noted as "A. —".

Statement of the Case

This action was begun in the District Court on January 14, 1975 with the filing of a complaint. Appellant, a state-chartered bank operating in Nassau and Suffolk Counties, New York, sought to overturn the Comptroller's approval of an application by Chase to establish a branch at the east side of Birch Hill Road between Lindbergh and Davis Streets, Locust Valley, Nassau County, New York, on the grounds that said approval was arbitrary, capricious and an abuse of discretion.

On July 11, 1975, the Comptroller moved, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order granting summary judgment in his behalf on the grounds that there was no genuine issue of material fact and that the decision of the Comptroller approving the Chase application was rational and in accordance with all applicable provisions of law. Chase joined in the Comptroller's motion on July 17, 1975.* Appellant cross-moved for summary judgment on August 22, 1975, contending that the Comptroller's approval of the application was invalid on the ground that it did not comply with the requirements of the New York State Banking Law and the General Regulations of the New York Banking Board.

On February 5, 1976, the District Court entered an opinion and order denying appellant's motion for summary judgment and granting summary judgment in favor of the Comptroller and Chase. The District Court

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* The Comptroller also moved for an order dismissing the complaint pursuant to Rules 12(b)(2) and (5) of the Federal Rules of Civil Procedure on the ground that he had not been properly served in the action. The District Court made no finding as to this contention but the Comptroller has declined to raise this issue on the appeal and waives any claim of improper service.

held that the scope of its review was limited to whether there was a rational basis for the Comptroller's decision as established by the administrative record (A. 128). After reviewing the ninety-two page record submitted by the Comptroller, Judge MacMahon found that it established an adequate factual basis to support the Comptroller's decision that the Chase branch would benefit the community and that the affluence of the area indicated that the existing financial institutions would not suffer serious adverse effect (A. 129). The Court also found that the Comptroller had complied with section 29 of the New York State Banking Law (McKinney 1971) (A. 130) and rejected appellant's contention that approval of the Chase application was in violation of Section 29.1 of the General Regulations of the New York Banking Board on the ground that the regulation was only a guideline as to the proper ratio of banks to area population and that although the Chase branch would create a ratio less favorable than that suggested therein, it would still be permissible given the general affluence of the area as demonstrated in the record (A. 131).

Issues Presented

1. Was the District Court correct in finding that the Comptroller's approval of the Chase application was not arbitrary and capricious, and had a rational basis in fact as established by the administrative record?

2. Was the District Court correct in finding that the Comptroller was not required to make an express finding that the approved Chase branch would serve the public convenience and advantage and that the Comptroller's decision was in accord with the applicable statute law of New York State?

3. Was the Comptroller bound by section 29.1 of the General Regulations of the New York State Banking Board in passing on the Chase application?

4. Was the District Court correct in finding that the Comptroller's approval of the Chase application was in fact permissible under section 29.1 of the General Regulations of the New York State Banking Board?

Statutes and Regulations

Sections 36(c) and (e) of the National Bank Act (the "Act"), 12 U.S.C. §§ 36(c) and (e) provide in pertinent part as follows:

> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches . . . at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by *the statute law* of the State in question . . . [emphasis added].
>
> (e) No branch . . . shall be established . . . without first obtaining the consent and approval of the Comptroller of the Currency.

The relevant New York State banking statute is section 29 of the New York Banking Law (McKinney 1971) which provides in pertinent part as follows:

> When a banking organization authorized by this chapter to open a branch office shall make written application for leave to do so, the superintendant, *if he shall find upon investigation that the public convenience and advantage will be promoted by the opening of such branch office* . . . shall issue a certificate . . . authorizing the

> opening and occupation of such branch . . . [emphasis added].

Section 29 of the New York Banking Law also provides that the New York State banking board by general regulation may delegate to the superintendent its authority to approve branch applications pursuant to such standards as the board by general regulation may establish. Consistent with that authorization, Section 29.1 of the General Regulations of the banking board, 3 New York Code, Rules & Regulations § 29.1, provides in pertinent part:

> (a) *Service area and population.* In acting upon bank and trust company branch applications, the superintendent shall give consideration to the character and extent of the area to be served by the proposed branch. Normally there should be a population of 5,000 persons per commercial bank facility within a reasonably defined service area . . . In service areas of above average income or in service areas consisting primarily of working population, a reduction in the population requirement stated above shall be permitted. In residential service areas of lower than average income, a higher population shall be required.

This regulation was repealed effective January 1, 1975.

Section 29.5 of the General Regulations of the New York State banking board, 3 New York Code, Rules & Regulations § 29.5, provides as follows:

> Branch applications of banks and trust companies which do not meet the standards described in sections 29.1, 29.2, 29.3 or 29.4 of this Part shall be referred to the Banking Board for decisions, and such sections shall not apply thereto.

Statement of Facts *

A. Procedural Background

On August 6, 1974, Chase filed its application for permission to establish a branch at the east side of Birch Hill Road between Lindbergh and Davis Streets, Locust Valley, Nassau County, New York. After receipt of the application by the Comptroller's Regional Office, notice of the bank's application was published in two local newspapers, *The New York Times* and *Newsday* (A. 65-67). Additionally, on August 16, 1974, the New York State Banking Department published its Weekly Bulletin containing notice that the application had been filed (A. 47, 52). By letter dated August 22, 1974, appellant filed a letter of protest with the Office of the Regional Administrator setting forth its reasons for opposing Chase's branch application (A. 59). Appellant did not request a hearing on the application. The Regional Administrator of National Banks for the Second National Bank Region appointed a commissioned national bank examiner to conduct an investigation of the application, which investigation was commenced on August 26, 1974 (A. 26-37). By letter dated August 27, 1974, Nassau Trust Company, located in Glen Cove, New York, filed its protest to the application (A. 58).

After review of the entire record, including the specific contentions of appellant and Nassau Trust Company and the unanimously favorable recommendations of the investigating and reviewing staff, the Comptroller approved the application on October 8, 1974 (A. 25).

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* The statement of facts is taken from the record before the Comptroller which is included in pertinent part in the record filed with this Court (A. 21-97).

The facts disclosed by the administrative record before the Comptroller and which resulted in his approval are summarized below.

B. The economic conditions in Locust Valley, New York

Locust Valley, New York, is located on the north shore of Long Island halfway between Glen Cove and Bayville. The General Service Area ("GSA")* is an affluent residential area with a single shopping district providing convenient access to goods and services to the residents of the area (A. 30, 85 and 86).

The GSA is almost totally developed with an estimated population of just over 10,000 persons (A. 26, 30). There are 2,290 families residing in the GSA with an average family income of approximately $20,000 per year (A. 84). The GSA for the most part contains single family dwellings in excellent condition with an average value exceeding $40,000. Eighty percent of the homes are owner-occupied. As of 1970, there were an estimated 2,882 housing units within the GSA and only 2 percent were unoccupied. Most of these single family dwellings are rambling one story homes or large family estates located to the north and east of the proposed site. There is also a large housing development, "South Ridge", to the south of the proposed site between Duck

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* *General Service Area* is a functional term describing the area from which a bank branch generates 75% or more of its loans and deposits. The Comptroller confirmed Chase's projection that the correct GSA of its proposed branch contains a population of 10,150 persons and extends from the proposed branch location approximately 1.9 miles north; 1.7 miles east; 1.7 miles south and .6 miles west (A. 26, 76-77). Although appellant disputes this finding of fact, it has made no showing that the finding is arbitrary, capricious or without a rational basis.

Pond Road and Frost Pond Road, which contains 250 dwellings priced from $40,000 to $60,000 (A. 30, 84-85).

Commercial development within the GSA consists of a small shopping district, "Birch Hill Shopping Center", adjacent to the proposed branch site which contains a supermarket and ten small retail stores as well as a branch of the Prudential Savings Bank (A. 30, 86). Inasmuch as the "Birch Hill Shopping Center" contains the only supermarket within two miles or more, most residents do their daily shopping there. In addition, there are thirty small retail stores (A. 86) at the intersection of Birch Hill Road and Forest Avenue and a new office building presently under construction located on Forest Avenue adjacent to appellant's bank (A. 87).

Chase proposed to locate its branch within the village of Locust Valley at a site adjacent to the Birch Hill Shopping Center and on one of the village's major traffic arteries, Birch Hill Road. The site provides excellent exposure and customer access (A. 30, 87, 88). Moreover, since many of the residents of the GSA commute to jobs in New York City, the branch would permit commercial banking services both at home and working locations for these residents (A. 85).

C. The banking community in Locust Valley

There are two commercial bank branches and a branch of a New York City savings bank conducting business within the GSA. These are: appellant Hempstead Bank, Hempstead, New York, which has $180,489,000 in deposits with $12,300,000 in deposits at its Locust Valley office; the Nassau Trust Company of Glen Cove, New York, with $102,697,000 in deposits and $9,500,000 in deposits at its Locust Valley office; and Prudential Savings Bank of Manhattan, with $565,619,000 in deposits and $25,000,000 in deposits in its Locust Valley office (A. 25, 29, 35).

In applying to the Comptroller for permission to establish a branch, Chase indicated that it desired the new branch for the purpose of expanding its present clientele to the residents of not only Locust Valley, but also the neighboring communities of Lattingtown, Mill Neck and Matinecock (also affluent residential areas) and in order to serve the residents of the area with additional, convenient and competitive banking services (A. 28, 77-79) including the convenience of offering to those residents who commute to New York City, banking at locations near work and home (A. 85).

D. Protests

In its August 22, 1974 letter to the Regional Administrator protesting Chase's branch application (A. 59-63), appellant disputed Chase's estimate of the GSA population,* the distribution of income among the area's residents, and the need for additional banking services. Appellant conceded that within the communities contained in its estimated GSA the median family income ranges from $13,386 to $24,781, which "admittedly ranks the area high as compared with Nassau County as a whole" (A. 59).

Nassau Trust Company opposed the application upon similar economic grounds and contended, as does appellant herein, that the Comptroller had failed to comply with the aforementioned New York State statutory and regulatory standards (A. 41-46). Nassau has not challenged the decision of the Comptroller and is not a party to this action.

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* Appellant contended that the GSA contained only 7,730 persons contrary to Chase's projection of a GSA containing 10,150 persons, which was in fact confirmed by the Comptroller as was Chase's estimate of its general economic conditions (A. 26, 30).

E. Administrative review of the application

The Comptroller's staff members who reviewed the application agreed unanimously that the strong factor in favor of approval of the application was the addition of a new competitor to the Locust Valley market (A. 25, 37).

The investigating national bank examiner and the Regional Administrator concurred in the view that the application's favorable factors—namely the addition of another competing bank and the apparent economic support for such an addition without substantial adverse effect upon the existing banks—outweighed the single unfavorable factor that the GSA had apparently reached developmental maturity. Both the examiner and the Regional Administrator recommended approval of the application (A. 37, 39).

Similarly, a member of the Comptroller's Washington staff—the Director of the Comptroller's Bank Organization Division—recognized that the relative affluence of the GSA provided adequate support for an additional branch and that the addition of another competitor to the market area would serve the banking public. This view was concurred in by the Deputy Comptroller who reviewed the application and stated "[e]ntry will stimulate competition and can be supported by available business" (A. 25).

On October 8, 1974, the Comptroller approved the branch application as in the public interest and in all respects in accordance with law (A. 25).

ARGUMENT

POINT I

The District Court correctly found that the record before the Comptroller established a rational basis for his approval of the Chase application and that the approval was not arbitrary or capricious.

Appellant concedes (Appellant's Brief, p. 9) that the appropriate standard of judicial review of the Comptroller's decision was whether it was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" as provided in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). As clearly described by the Supreme Court in *Camp* v. *Pitts*, 411 U.S. 138, 141-142 (1973):

> [T]he proper standard for judicial review of the Comptroller's adjudications is not the 'substantial evidence' test which is appropriate when reviewing findings made on a hearing record, 5 U.S.C. § 702(2)(E). Nor was the reviewing court free to hold a *de novo* hearing under § 706 (2)(F) and thereafter determine whether the agency action was 'unwarranted by the facts'. . . .
>
> The appropriate standard for review was, accordingly, whether the Comptroller's adjudication was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' as specified in 5 U.S.C. § 706(2)(A). In applying that standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.

Accordingly, so long as the administrative record before the Comptroller at the time he approved the Chase application establishes a rational basis for his decision, that decision must be upheld. *First National Bank of Fayetteville* v. *Smith*, 508 F.2d 1371 (8th Cir. 1974), *cert. denied*, 421 U.S. 930 (1975); *Merchants & Planters Bank of Newport, Arkansas* v. *Smith*, 380 F. Supp. 354, 356 (E.D. Ark. 1974), *aff'd*, 516 F.2d 355 (8th Cir. 1975); *First National Bank of Southhaven* v. *Camp*, 333 F. Supp. 682 (N.D. Miss. 1971), *aff'd*, 467 F.2d 944 (5th Cir. 1972).

Section 36(c) of the Act, quoted in pertinent part above, provides that the Comptroller may approve new branches for national banks only "if such establishment and operation are at the time authorized to State banks by the statute law of the State in question". 12 U.S.C. § 36 (c).* The purpose of this statute is to ensure competitive equality so that national banks may not overwhelm and displace a state's own banks or enjoy an unfair advantage over them. *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966). Accordingly, in reviewing the Chase application, the Comptroller was required to weigh it against the standard imposed by the statute law of New York state, and to deny the application if that standard was not met. *First National Bank of Fairbanks* v. *Camp*, 465 F.2d 586, 597 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1124 (1973). *First Bank and Trust Company* v. *Smith*, 509 F.2d 663, 665 (1st Cir. 1975).

The statute law of New York provides in pertinent part that state banks may establish branch offices only

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* Section 36 also requires that the applicant comply with the State capitalization requirements. Appellant does not dispute that Chase has satisfied these requirements.

if the state superintendent of banking finds upon investigation "that the public convenience and advantage will be promoted by the opening of such branch office." N.Y. Banking Law § 29 (McKinney 1971).

The record in this action contains substantial evidence establishing that the Chase branch will in fact serve the public convenience and advantage and that in approving the application extensive consideration was given to this criterion. As the District Court found after reviewing the record:

> [T]here was an adequate factual basis in the record to support the Comptroller's decision that establishment of another competitive branch would benefit the community and that the affluence of the area indicated that the existing financial institutions would not suffer serious adverse effect (A. 129).

Independent review of the record by this Court inevitably leads to the same conclusion.

The Comptroller approved Chase's application after finding that:

> 1. Establishment of the branch would add a competitive factor to the area.
>
> 2. Establishment of the branch would enable the bank to extend its facilities into an area not currently serviced by the applicant.
>
> 3. The affluence of the area would seem to indicate that it can support the proposed branch without causing greatly adverse conditions (A. 37, 39).

These findings were made only after a thorough investigation had been conducted by the Comptroller's staff which investigation is documented in the record.

After Chase submitted its application, notice of its filing was published and written protests from each of two competing banks were received by the Office of the Comptroller (A. 41-46, 59-63). A commissioned national bank examiner was directed to conduct an investigation of the application resulting in a written report submitted to the Comptroller (A. 23-39). Additionally, the Regional Administrator of National Banks in New York and senior members of the Comptroller's Washington staff reviewed the application, adding to the record their comments and their recommendations for action by the Comptroller (A. 24, 25, 38, 39). On October 8, 1974, in accordance with unanimous favorable recommendations by the members of his reviewing staff, the Comptroller approved Chase's application (A. 21).

The administrative record produced by these investigative efforts supports the conclusions upon which approval of Chase's application was based. Permitting a new competitor to enter the economically strong market of Locust Valley would in fact benefit the banking public by providing alternative convenient banking services and heightened competition among banks in the area.

The record contains substantial evidence that although the GSA of the approved branch is not likely to demonstrate dynamic growth in the future, it is a relatively affluent area capable of supporting additional competitive banking services. No member of the Comptroller's staff found that establishment by Chase of a branch in Locust Valley would substantially injure any of the existing financial institutions. On the contrary, the investigating examiner found that "[h]omes in the area [GSA] have an average value of approximately $41M and values extend to in excess of $100M in the northern sector of this affluent area . . ." (A. 30) and "[t]he

affluence of the area would seem to indicate that it can support the proposed branch . . ." (A. 37). The Director of the Comptroller's Bank Organization Division similarly found that the GSA is "[a] high quality residential area that can support added competition" (A. 25). Indeed, the appellant in its letter of August 22, 1974 to the Regional Administrator admits that the median family income in the GSA extends from $13,386 to $24,781 "which admittedly ranks the area high as compared with Nassau County as a whole" (A. 59).

Thus, the administrative record before the Comptroller establishes the requisite rational basis for his decision approving the Chase application. This being the case, neither a protestant's nor the Court's judgment may be substituted for that of the Comptroller. *First National Bank of Fayetteville* v. *Smith, supra at* 1378; *Sterling National Bank of Davie* v. *Camp*, 431 F.2d 514 (5th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971); *Webster Groves Trust Co.* v. *Saxon*, 370 F.2d 381 (8th Cir. 1966).

POINT II

The District Court correctly found that the Comptroller was not required to make an express finding that the approved Chase branch would serve the public convenience and advantage and that his decision was in accord with the applicable statute law of New York State.

Appellant contends that the Comptroller failed to give due consideration to the New York State statutory standard in that he made no express finding that the approved Chase branch would in fact serve the public convenience and advantage. It is clear, however, that

neither the Act nor the Administrative Procedure Act requires the Comptroller to make formal findings or even to comment personally on the issues raised on the record before him. *Camp* v. *Pitts*, *supra* at 140; *City National Bank* v. *Smith*, 513 F.2d 479, 484-485 (D.C. Cir. 1975); *First National Bank of Fayetteville* v. *Smith*, *supra* at 1378-1379. This is so because the function of the hearing panel in such cases is that of a "fact-gathering organ" rather than a fact-finder. *First National Bank of Fayetteville* v. *Smith*, *supra* at 1379; *First National Bank of Fairbanks* v. *Camp*, *supra* at 604.

Indeed, the very case upon which appellant relies, *First Bank & Trust Co.* v. *Smith*, *supra*, offers no support. In that case, the First Circuit remanded the Comptroller's decision approving a national bank branch application on the ground that the record upon which he based his decision did not make clear whether or not the applicable state standard had been taken into account. The Court found, however, that the record before the Comptroller was so deficient as to "frustrate effective judicial review" and specifically that "there are indications on the face of the record that those with the responsibility for guiding the Comptroller may not have considered it [the applicable state standard] at all." *Supra* at 666. Moreover, in remanding the case to the district court to determine whether the Comptroller had taken into account the relevant state statutory standard, the Court specifically held that the Comptroller was not required to make a specific finding:

> We do not hold the Comptroller to any particular form of record; a conclusory statement or even a subordinate's report directed to the relevant standard might have satisfied us that the appropriate legal standard had been recognized and applied. *Supra* at 666. [Footnote omitted].

The record in this action demonstrates that the Comptroller's approval of the Chase application was based upon findings of his staff that the proposed branch would serve the public convenience and advantage by providing alternative convenient banking services to the community and heightened competition among banks in the area. Federal courts have repeatedly recognized that such an increase in competition serves the public convenience and advantage.

Thus, in *Clermont National Bank* v. *Citizens Bank National Association*, 329 F. Supp. 1331 (S.D. Ohio 1971) plaintiff challenged the Comptroller's approval of an application to establish a branch bank contending in part that "the Comptroller may not authorize a branch in a service area if the banking needs of the inhabitants of that service area are fully and adequately being met at that time." *Supra* at 1339. The District Court answered this contention stating (329 F. Supp. at 1339-1340, 1344):

> This record is absolutely clear that at this time, as well as at all times of interest here, the banking needs of the service area . . . are being fully and adequately met by the existing banking facilities. . .
>
> . . . .
>
> The defendant's [Comptroller's] position essentially is that the provision of competition or the prevention of a local monopoly is in and of itself a sufficient basis for a finding or conclusion that the convenience and needs of the public will be served by a new branch. . .
>
> . . . .
>
> In the view of this Court, the providing of competition in the banking, as well as any other business . . . 'serves the convenience and needs of the public' . . .
>
> . . . .

> Cases such as *Philadelphia Bank* [*United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963)], *Phillipsburg Bank* [*United States* v. *Phillipsburg National Bank and Trust Company*, 399 U.S. 350 (1970)], and the *Lexington, Kentucky, Bank* [*United States* v. *First Nat. Bank and Trust Company of Lexington*, 376 U.S. 665 . . .] cases are clear authority for the statement that competition serves the convenience and needs of the public. One way to provide competition is to prevent competitors in the banking field from merging; another and just as effective a way is to provide for a new entity. The result in either case is the same to John Q. Public —providing competition. (329 F. Supp. at 1339-1340, 1344).

Similarly, in *First National Bank of Southhaven* v. *Camp*, 471 F.2d 1322, 1326, n.5 (5th Cir. 1973), the Fifth Circuit emphasized the importance to local economies of regulatory practices which will provide for new market entry by additional competitors and, in addition, observed that ". . . there is ample authority holding that the provision of competition in the banking field is sufficient to meet the public convenience and necessity standard." See also *United States* v. *Phillipsburg National Bank & Trust Co.*, 399 U.S. 350 (1970) where the Supreme Court stated that:

> Indeed, competitive commercial banks, with their cluster of products and services, play a particularly significant role in a small community unable to support a large variety of alternative financial institutions . . . if the costs of banking services are allowed to become excessive by the absence of competitive pressures, virtually all costs in our credit economy will be affected . . . *Supra* at 358.

As shown above, the investigation conducted by the Comptroller's staff established that a new Chase branch in Locust Valley would serve the banking public with heightened competition among banks and alternative banking services and that the community could support the branch without imposing any serious adverse financial impact upon the existing banking institutions. The record thus clearly demonstrates that the relevant New York statutory standard was recognized and applied in reviewing the Chase application and that its approval was predicated upon the conclusion of the Comptroller's staff, drawn after extensive investigation, that the proposed branch would in fact serve the public convenience and advantage.

POINT III

The Comptroller was not bound by Section 29.1 of the General Regulations of the New York State Banking Board in passing on the Chase application.

Appellant argues that the Comptroller was bound not only by the statutory standard contained in Section 29 of the New York Banking Law, but also by the general regulations of the New York State Banking Board. Specifically, appellant contends that pursuant to the population guidelines contained in section 29.1 of said regulations, 3 New York Code, Rules & Regulations § 29.1, a state bank would not have been permitted to open a branch in the Locust Valley area and therefore that the Comptroller's approval of the Chase application is in violation of Section 36 of the Act.

This argument, for which appellant has not cited any authority, is contrary to the clear language of the statute upon which it relies. Section 36(c) of the Act requires that the Comptroller approve new branches for national banks only "if such establishment and operation are at the time authorized to State banks by the *statute*

law of the State in question" 12 U.S.C. § 36(c) [emphasis added]. The administrative regulations of the New York State Banking Board are not a statute within the meaning of the Act and therefore are not binding upon the Comptroller.

Although a properly enacted administrative regulation may be part of "the law of the State" in the sense that it applies with equal force to those coming within its range, it is not a statute in the narrow sense intended by the Act. This issue was dealt with in *South Dakota* v. *National Bank of South Dakota*, 219 F. Supp. 842 (D.S.D. 1963), *aff'd*, 335 F.2d 444 (8th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965). In that case, the State of South Dakota challenged the merger of a national bank with three state banks on the ground that the merged banks would be operated as branches beyond the legal geographic limitations permitted by state law and the merger was therefore in violation of § 36(c). As here, the geographic limitation was contained not in a state statute but rather in the administrative rules and regulations of the South Dakota State Banking Commission. The State contended that its administrative regulations were part of the law of the state and therefore binding on the Comptroller.

The District Court, citing Mr. Justice Frankfurter's dissenting opinion in *United States* v. *Mersky*, 361 U.S. 431 (1960),* that the meaning of the term "statute" in

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* In *United States* v. *Mersky*, *supra*, the Supreme Court held that a criminal violation of federal regulations enacted pursuant to the Tariff Act of 1930 carried the same sanctions as a violation of the statute on the ground that the statute and regulations were inextricably intertwined. Nonetheless, the Court stated that the term statute applies only to legislative enactments and not to regulations administratively adoped pursuant thereto:

> An administrative regulation, of course, is not a "statute." While in practical effect regulations may be called "little laws," they are at most but offspring of statutes. Congress alone may pass a statute . . . . [Footnote omitted] 361 U.S. at 437.

a particular context must be derived from the relevant legislative history, analyzed the legislative history of § 36(c) of the Act as follows:

> Summarized briefly, this legislative history shows that as originally proposed, the so-called Bratton Amendment § 36(c) authorized national banks to establish branches in those states in which state banks were permitted to do so by the law of the state. Senator Wheeler of Montana requested that the words "expressly authorized" be substituted for the word "permitted." Senator Wheeler was concerned that a state statute that was silent on the subject might be construed as permitting branch banking. Thus it is apparent that "the law of the state" was intended to mean an affirmative expression by the state legislature. The day following the proposed amendment requested by Senator Wheeler, Senator Blaine of Wisconsin proposed the following addition to the Bratton Amendment: "and under restrictions as to location imposed by the law of the state on state banks." This leads to the conclusion that the phrase "law of the state" was used in the same context as it was in the first part of the amendment. In the Conference Committee, the word "statute" was placed before the phrase "law of the state" in the first part of the amendment. No explanation was given for the insertion of this word.
>
> From this legislative history it seems apparent that Congress was concerned that national banks be authorized to branch only where the state legislatures have adopted statutes authorizing state banks to establish branches. It seems equally apparent that Congress intended that the restrictions as to location also be based upon affirmative legislative action by the states. 219 F. Supp. at 849.

Based upon this analysis, the Court concluded that national bank branching was governed by the applicable *statutory* provisions of state banking law but not by state administrative regulations adopted pursuant thereto.* As stated therein:

> It is the Court's opinion that the phrase "statute law of the State" in § 36(c) refers to the enactments of the legislature and does not include the administrative rules and regulations adopted pursuant to such enactments. Under this view, while Rule 17 may be a part of the law of South Dakota, it is not a part of the statute law. Supra at 850.

The Court went on to state that:

> The ease with which the rules and regulations of the State Banking Commission can be changed lends support to the argument that Congress intended that national banks should be subject to the statute law of the state rather than to administrative rules and regulations of an administrative agency. Ibid.

This argument is particularly appropriate herein. Regulation § 29.1 was repealed by the New York State Banking Board effective January 1, 1975. Thus, if for some reason the Comptroller had not acted on the Chase application on October 8, 1974 but rather had waited three months until after January 1, 1975, appellant would have had no basis upon which to contend that the Comp-

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* It should be noted that the District Court went on to find that the administrative regulation in quesion was invalid because it conflicted with the state statute and that in affirming the decision of the District Court, the Court of Appeals did not reach the issue of whether the term statute as used in the Act incorporates administrative regulations.

troller was not complying with state law, statutory or otherwise.

To compel the Comptroller to comply with often ephemeral state rules and regulations would severely impede the effectiveness and uniformity of our national banking system which Congress has determined should be subject only to the standards imposed by state statutory law. Indeed, the administrative regulation was repealed without any corresponding change in § 29 of the New York State Banking Law, which sets forth the applicable state statutory standard. It would appear therefore that not only is the administrative regulation excluded from the purview of section 36(c) of the Act, but also that the statute and the regulation are not "inextricably intertwined" as was the case in *United States* v. *Mersky*, *supra*.

While *South Dakota* v. *The National Bank of South Dakota, et al.*, *supra*, is the only factually analogous case dealing with the effect of a state administrative regulation, numerous cases have held that a formal opinion of a state banking administrator applying the relevant state statute and opposing a national bank branch is not binding upon the Comptroller and need not be considered by him. Thus in *First National Bank of Fairbanks* v. *Camp*, *supra*, the Comptroller's licensing of a national bank branch in Fairbanks, Alaska was challenged on the ground that the state banking director had stated that his assessment of economic and banking conditions in Fairbanks would preclude his approving a branch application from any state bank and therefore under state law and hence under § 36(c) of the Act, a national bank could not establish a branch in Fairbanks. The Court rejected this argument on the ground that it would impose the additional restraint on national banks of a veto power in the hands of the state supervisor and thereby defeat the very purpose of § 36(c), namely, equality of opportunity for expansion. As stated therein:

> Both the statutory language of Section 36(c) and the competition component of the doctrine of "competitive equality" require that neither state nor federal administrator be empowered to veto branch authorizations of the other. The state supervisors apply their state statutes in evaluating state bank branch applications wholly independently of any federal supervision, and we hold that the Comptroller may similarly apply those same state statutes in evaluating national bank branch applications independently of control by the opinions of the state supervisor. [Footnote omitted]. *First National Bank of Fairbanks* v. *Camp, supra* at 596-97.

See also *Union Savings Bank of Patchogue* v. *Saxon*, 335 F.2d 718 (D.C. Cir. 1964); *Leuthold* v. *Camp*, 273 F. Supp. 695 (D. Montana 1967), *aff'd per curiam*, 405 F.2d 499 (9th Cir. 1969).

These cases dealing with opinions of state banking administrators rather than administrative regulations, are of equal precedential value in the context of this action. In each of them, national bank branches were permitted in situations where state bank branching applications would have been rejected by the respective state banking administrators. Here, however, the administrative regulation involved is only a permissive guideline which has since been stricken. Indeed, as is demonstrated *infra*, even the Superintendent of Banks for the State of New York, operating under Regulation § 29.1, would have been able to approve establishment of a state bank branch at the location proposed by Chase. Considering that the purpose of § 36(c) of the Act is to establish competitive equality of opportunity of expansion between national and state banks, a much stronger argument could be made in those cases than here that fulfillment of this purpose mandated rejection by the Comptroller of the respective national bank applications.

Regardless of whether the state administrative interpretation involved is by regulation or by opinion of the state administrator, if the Comptroller were bound by state administrative restrictions, state administrators could by fiat limit his statutory discretion—a wholly untenable interference with the entire system of national bank regulation. Within the limits imposed by state statutes, § 36(e) of the Act provides explicitly that authorization of a national banking branch requires only the consent of the Comptroller:

> (e) No branch . . . shall be established . . . without first obtaining the consent and approval of the Comptroller of the Currency. 12 U.S.C. § 36(e).

To require the Comptroller to look beyond state statutory law to state administrative regulation and opinion would subject his discretion to the ultimate approval of the state superintendent, a situation clearly inconsistent with the language and intent of the Act.

Rather, the Comptroller's obligation is to weigh each branch application against the standard imposed by the statute law of the state and to approve the application if that standard is met. *First Bank and Trust Co.* v. *Smith*, *supra* at 665; *First National Bank of Fairbanks* v. *Camp*, *supra* at 597. As the District Court properly found, the standard set forth in § 29 of the New York Banking Law, "'that the public convenience and advantage will be promoted by the opening of such branch office,'" has been met. Accordingly, the decision of the Comptroller approving the Chase application should be upheld.

POINT IV

The District Court correctly found that the Comptroller's approval of the Chase application was permissible under Section 29.1 of the General Regulations of the New York State Banking Board.

Even if it were assumed *arguendo* that the Comptroller were bound by section 29.1 of the general regulations of the New York State Banking Board, his approval of the Chase application accords with the administrative guidelines set forth therein. As the District Court held:

> Regulation 29.1 does not, however, establish a mandatory ratio of one bank per 5,000 persons. It merely provides a guideline which may then be varied according to the economic health of the area. Although the approval of the Chase branch would result in a ratio less than that suggested by the regulation, it would still be permissible given the general affluence of the area (A. 131).

Regulation § 29.1 directs the New York State Superintendent of Banks to consider "the character and extent of the area to be served by the proposed branch" when reviewing the merits of bank applications for new branches to guide the superintendent in relating this consideration to his determination of whether a new branch would serve the public convenience and advantage, the regulation provides that

> Normally there should be a population of 5,000 persons per commercial bank facility within a reasonable defined service area . . . In service areas of above average income or in service areas consisting primarily of working population, a reduction in the population requirement stated above shall be permitted.

As is indicated by the language of the regulation, its intent is to provide a flexible guideline. Although "[n]ormally" the Superintendent "should" approve the location of new branches of commercial banks if a population of at least 5,000 persons would exist for each commercial bank facility after the establishment of the new branch, the Superintendent "shall be permitted" to vary this proportion if he determines that the income of the area's population is above or below average. Thus, in areas where unusual income levels are found to exist, the Superintendent is given the discretion to determine the number of commercial banks which would be appropriate to the needs and capacity of the particular population.

The administrative record indicates that the Comptroller's decision is consistent with the guidelines of regulation § 29.1. Although location of the Chase branch in Locust Valley would result in 3,383 persons per commercial bank facility—a lower proportion than that suggested by the regulation—this proportion is permissible in the context of the economic conditions of the area. The bank examiner characterized the Locust Valley area as largely residential and affluent, containing homes with an average value of approximately $41,000. This characterization is strongly supported by the estimates of average family income as approximately $20,000 in Chase's application (A. 78, 84) and the statement in appellant's letter of protest that the median family income ranges from $13,386 to $24,781 which "admittedly ranks the area high as compared with Nassau County" (A. 59).*

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* Although this statistic is not contained in the record, the Comptroller's conclusions regarding the economic conditions of the area are corroborated by the fact that as of 1972, Nassau County had the second highest per capita personal income of all counties in New York State. New York State Statistical Yearbook, 1974, p. 95, table C-2.

Thus, the "normal" guideline of regulation § 29.1 would not preclude approval of the Chase application. Rather the Comptroller, exercising the same discretion accorded the State Superintendent, may reduce the number of persons per commercial bank facility to a level which in his judgment is appropriate to the capacity and needs of the area's population.

Indeed, even if it were determined that the Chase application did not meet the standards set forth in regulation §29.1, this would not have resulted necessarily in rejection of a similar application by a state bank. Pursuant to regulation §29.5, entitled *Non-conforming applications*, non-compliance with regulation §29.1 would have resulted only in referral of the application to the New York State Banking Board which would in turn have issued its decision granting or denying the application. As has been shown above, the Comptroller is clearly not bound by the opinion of a state banking superintendent as to whether he would have permitted a state bank to establish a branch under the circumstances of the particular national bank branching application at issue.

CONCLUSION

For the reasons stated, the decision of the District Court should be affirmed.

Dated: New York, New York
May 10, 1976

Respectfully submitted,

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CA 76-6047

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn, deposes and says that s he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

10th day of May, 19 76 s he served 2 copy s of the

within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Dalton & Henoch, Esqs.,
50 Clinton St.
Hempstead, NY 11550

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

10th day of May, 1976

Ralph L. Lee

RALPH L. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977